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No. 354

IN THE

Supreme Court of the United States

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST, and TERENCE P. O'ROURKE,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Statement of Matter Involved

Petitioners Howitt and Dewhurst, ticket sellers for the Florida East Coast Railway Company, petitioner Lee, diagram clerk for the railroad, all located at Miami Florida, were indicted for conspiracy to violate the Interstate Commerce Act, by agreeing to collect and receive from purchasers of passenger transportation accommodations money in excess of the regular fares currently in force under prevailing tariffs for such service. Petitioner O'Rourke, a ticket seller for the same carrier was charged on an indictment in ten counts with committing substantive offenses in violation of the Act in substantially the same manner as alleged in the conspiracy count. The indict-

ments were consolidated and tried together, the defendants were convicted, and appealed to the Circuit Court of Appeals for the Fifth Circuit, which affirmed.

These petitioners, in addition to receiving and accounting to the carrier for the regular passenger tariff fare, collected in addition extra compensation in the way of tips or gratuities; they were not indicted for charging and demanding this extra money, but only for collecting and receiving it. (Secs. 1, et. seq., 49 U. S. C. A.) However had the transportation of property been involved an offense would have been committed under Sec. 1, sub-sec. (17) (b), where bribery is punished, if accepted for moving cars; through shipper or other inducement. This bribery section is not contained in any portion of the act having to do with the transportation of passengers.

In the trial court defendants maintained by demurrer, motion for directed verdict, and exception to the court's charge that for the acts of accepting tip, gratuities, or bribes, by whatsoever name the extra money was accepted by them, they did not offend against the Commerce Act, for the Act, so far as passenger traffic was concerned, dealt only with the carrier as a principal, and if the employee turned over to the carrier the proper tariff charge collected, and kept the tips, no offense was committed; that the Act, since its enactment in 1887, never contemplated that such offenses were within the purview of the Act. Again it was maintained that the Act was so vague, in its terms, as not to come within the scope of a proper and legal criminal statute.

The trial court, in its ruling on the demurrer to the indictment, on the motion for directed verdict, and in its charge, construed the Interstate Commerce Act, contrary to its plain wording and intent, in specifically holding that if an agent received a tip, when he sold a ticket, he would be violating the act.

The appellate court held that "while it is probable that the legislative mind did not foresee offenses of this particular character when the law was passed, nevertheless the act was drafted in language sufficiently broad to include such offense by individual employees of a carrier, especially where the offenses resulted in unjust discrimination that the act was designed to prevent" (Opinion not reported).

Jurisdictional Statement

The statutory provisions believed to sustain the jurisdiction of this Court are Section 241, Judicial Code (Section 347, Title 28, U. S. Code), and (Act of June 7, 1934, ch. 426, 48 Stat. 926).

The statutes involved are sections 2, 3, subsection 7 of 6 and 10, part I, Interstate Commerce Act, U. S. Code, Title 49, sec. 2, sec. 3, subsec. 7 of sec. 6 and sec. 10; all originally being a part of the Act of Congress of February 4, 1887, c. 104, 24 Stat. 382, as amended.

Section 2 provides:

> "If any common carrier subject to the provisions of this chapter shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Section 3 provides:

"(1) Undue preferences or prejudices prohibited. It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; PROVIDED, HOWEVER, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic or any other carrier or whatever description."

Sub-section 7 of Section 6 provides:

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any

privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 10 provides:

"Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this chapter required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this chapter to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this chapter for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed $5,000 for each offense; PROVIDED, that if the offense for which any person shall be convicted, as aforesaid shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

Date of Judgment Sought to be Reviewed

The United States Circuit Court of Appeals of the Fifth Circuit on June 14, 1945 entered its judgment of affirmance of the judgment of the United States District Court for the Southern District of Florida, entered in turn on the 3rd day of February 1945. Rehearing denied July 18, 1945 by Appellate Court.

Questions Presented

Are ticket sellers of a railroad corporation involved in Interstate Commerce transportation, amenable under the provisions of the Interstate Commerce Act for accepting tips, gratuities or bribes from passengers, in addition to the regular tariff rate, when they hand over such regular tariff rate to their employer, and simply retain the tips?

Reasons for Allowance of the Writ

a. This case is the first of its kind to be tried in a District Court and appealed to a Circuit Court of Appeals since the enactment of the Interstate Commerce Act in 1887, but there are pending and undisposed of in the District Courts throughout the country many cases involving the same offense.

b. There is pending before the Committee on Interstate and Foreign Commerce, H. R. 3747, wherein it is sought to have the Congress enact a law covering and punishing the offenses for which the defendants were convicted under the present Interstate Commerce Act.

c. The appellate court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court.

d. The appellate court in this instance has decided a federal question in a way probably in conflict with decisions of this Court, in that the statutes under which the defendants were tried are so vague, indefinite and insufficient as not to cover the facts, whereas this Court has said "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid." *United States* v. *Lacher*, 134 U. S. 624, 628.

Prayer

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of record of all proceedings of the said Circuit Court of Appeals in said case therein entitled Stanley Howitt, Flora Post Lee and James F. Dewhurst (Case No. 1) and Terence P. O'Rourke (Case No. 2) Appellants, versus United States of America, Appellee, No. 11287, to the end that the said case may be reviewed and determined by this Court and that your petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and that the said judgment of said Circuit Court of Appeals may be reversed by this honorable Court.

And your petitioners will ever pray.

BART. A. RILEY
Counsel for Petitioners.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BART. A. RILEY, being first duly sworn, deposes and says that he is counsel for petitioners named in the foregoing petition; that he prepared the same, and that the matters and things therein set forth are true as he verily believes.

BART. A. RILEY.

Sworn to and subscribed before me
this 16th day of August, A. D. 1945.

EMMA LEONA,
Commissioner of Deeds,
New York.

Note

The cases cited by the appellate court follow with a parenthetical note.

United States v. *Estes*, 6 F. (2) 902 (ticket sold by pullman conductor at less than legal rate, and proceeds probably embezzled).

United States v. *Peterson*, 1 F. (2) 1018. (Receipts from sale of ticket embezzled by ticket seller.)

United States v. *Tozer*, 37 Fed. 637. (Freight proceeds received by agent of railroad company and remitted to railroad, but contention was made that money was higher than tariff rate.)

Union Pacific Railroad Company v. *United States*, 313 U. S. 450. (An equity suit concerning freight which involved an interpretation of the Elkins Act.)

Therefore, petitioners are lacking in authorities which relate to the matter at bar and refrain, in the interest of brevity, from filing a brief which could not supplement, without over-emphasis, the matters set forth in the petition.